UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LUNDEEN SIMONSON, INC.

and Case 19–CA–195000

OPERATIVE PLASTERERS &
CEMENT MASONS INTERNATIONAL
ASSOCIATION, LOCAL NO. 72

Adam D. Morrison, Esq., for the General Counsel.
Bryon Simonson, pro se, for the Respondent Company.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Lundeen Simonson, Inc., a construction contractor in Spokane, Washington, has refused to provide Operative Plasterers & Cement Masons Local 72 with requested information since January 2017 regarding the Company's projects, employees, payroll, and subcontracts, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act. The Company's answer denies the allegation. Specifically, it denies that the Company had a collective-bargaining agreement with Local 72 at the time of the January 2017 information request, and that the requested information was relevant and necessary for Local 72 to enforce the agreement.[1]

I. The Relevant Facts

The Company provides commercial and/or industrial concrete polishing services. In June 2013, Bryon Simonson, the Company's owner and president, executed a memorandum of understanding (MOU) with Local 72 agreeing to be "signatory [to] and bound" by its 2012–2016 multiemployer collective-bargaining agreement with the Inland Northwest Associated General Contractors of America, Inc. (AGC).[2] Pursuant to the hiring hall provisions of the AGC agreement, Local 72 thereafter referred cement masons to the Company on request for projects covered by the agreement.

[1] See the Company's September 1, 2017 amended answer, GC Exh. 1(j). There is no dispute, and the record establishes, that Local 72 is a labor organization within the meaning of Section 2(5) of the Act; that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act; and that the Board has jurisdiction.

[2] See GC Exhs. 3 and 4. There is no evidence that the Company was a member of, or otherwise assigned its bargaining rights to, AGC.

However, in mid-2015, the Company failed to make benefit fund contributions and dues payments as required under the trust fund and union security provisions of the agreement. Local 72 at that time therefore refused to refer any cement masons to the Company pursuant to article 15 and Schedule B of the AGC agreement, which authorized the Union to take "economic action" against a signatory employer to collect unpaid benefit fund contributions.[3]

The following year, in late April 2016, the Company attempted to terminate its agreement with Local 72 by mailing it a notice of termination. However, article 26.1 of the AGC agreement provided that a signatory party desiring to modify, amend, or terminate the agreement had to file a written notice at least 60 days before the agreement's May 31 expiration. Absent such notice, the agreement would "continue from year to year, June 1 through May 31 of each year, by automatic renewal unless changed, superseded [*sic*] by a successor principal agreement which shall apply or terminated [*sic*]." Accordingly, the Company's notice was untimely. Local 72 so advised Simonson by letter dated May 5, 2016, stating that the notice was therefore "legally ineffective" and that the Company "remain[ed] bound by the agreement, and any successor agreement, in accordance with article 26.1."

However, Local 72 and/or AGC apparently gave timely notice of termination to each other, as they executed a successor 3-year agreement a few months later, on June 27, 2016. By its terms, the successor agreement was retroactively effective from June 1, 2016, and contained hiring hall, trust fund, and union security provisions similar to those in the 2012–2016 agreement.

Sometime thereafter, Local 72 learned that the Company was no longer using union workers or making reports to various union trust funds. Given the above history, Local 72 suspected that the Company was not complying with the trust fund and union security provisions. The Union was also concerned that the Company might be trying to skirt the foregoing provisions by subcontracting work to nonsignatory employers in violation of the subcontracting provisions.[4] Accordingly, on January 11, 2017, Local 72 mailed a letter to Simonson requesting the following information:

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[3] See Tr. 49–50. Articles 7 and 15 of the AGC agreement prohibited any strikes or slowdowns or cessation of work pending utilization of the agreement's grievance-arbitration procedures. However, article 15 provided that an employer's failure to make "wage, travel and/or zone pay differential, penalty pay, or other negotiated fringe payments" was not subject to the grievance procedure and that the Union had the right to take "economic action against the employer to collect such monies owed." Similarly, schedule B of the agreement ("Trust Funds") stated that, in the event an employer failed to make required monetary contributions, the Union "will take any economic action the Trustees of the funds deem necessary to insure proper collection of these contributions." There is no dispute that the Company was, in fact, delinquent in making contributions in mid-2015. See Tr. 16. The record is unclear, however, how long the Company remained delinquent or how long the Union refused to refer workers to the Company as a result.

[4] See Tr. 32–35. Both the 2012–2016 agreement and the successor agreement contained provisions stating that work covered by the agreement would not be subcontracted to nonsignatory employers.

(1) A list of all projects the Company had been awarded since January 1, 2016;

(2) A list of all projects the Company had bid on since January 1, 2016 and was awaiting an award;

(3) A list of all employees that performed work covered by the AGC agreement, and all payroll information for all such work, since January 1, 2016; and

(4) A list of all projects on which the Company subcontracted work covered by the AGC agreement since January 1, 2016, the names of the subcontractors, copies of the subcontracting agreements, and the scope of the work subcontracted.

Simonson did not respond. On February 1, Local 72 therefore resent the letter to Simonson by both email and fax. Again, however, Simonson did not respond or provide any of the requested information. Accordingly, on March 15, Local 72 filed the instant unfair labor practice charge with the NLRB regional office.[5]

II. Legal Analysis

A. Whether the Parties had an Enforceable Collective-Bargaining Agreement

There is no dispute that the Company effectively entered into a collective-bargaining agreement with Local 72 when Simonson executed the MOU in June 2013 agreeing to be "signatory [to] and bound by" the 2012–2016 AGC agreement. As indicated by the General Counsel, Section 8(f) of the Act authorizes an employer engaged primarily in the construction industry to enter into such "prehire" agreements with a union regardless of whether the union has ever demonstrated majority status. *See John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1987), cert. denied 488 U.S. 889 (1988).[6] And the Company does not contend that the agreement here was otherwise legally ineffective.[7]

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[5] The Regional Director subsequently issued the complaint on July 12, and the hearing was held on September 26. The parties waived the filing of posthearing briefs.

[6] The Company's answer admits that it is an employer in the building and construction industry. Although the answer generally denies the additional complaint allegation that the Company recognized Local 72 without regard to whether the Union had established majority status, there does not appear to be any real dispute about this. Thus, it appears that the relationship was, in fact, entered into pursuant to Section 8(f) of the Act, and that Local 72 is therefore only the limited exclusive representative of the unit employees for the period covered by the agreement. See *Bemboom Heating and Cooling LLC,* 360 NLRB No. 139, slip op. at 1 n. 2 (2014).

[7] The Company does not contend, and there is no record evidence, that Local 72 procured the MOU through fraudulent misrepresentations. See *Horizon Group of New England*, 347 NLRB 795 (2006).

It is also clear under Board precedent that the Company continued to have an enforceable agreement with Local 72 at the time of the Union's information request in January 2017. As indicated by the General Counsel, by failing to give Local 72 timely notice of its desire to terminate the AGC agreement prior to its May 31, 2016 expiration date, the Company remained bound by the agreement for another year pursuant to the agreement's automatic year-to-year renewal provision. See *Fortney & Weygandt*, 298 NLRB 863 (1990) (finding that the respondent construction contractor, which had signed a similar letter of assent under Section 8(f) of the Act making it a party to a multiemployer AGC agreement, remained bound by the agreement pursuant to its automatic year-to-year renewal provision by failing to give timely notice of its desire to terminate the agreement before it expired, notwithstanding that the union itself had given timely notice of its desire to terminate the agreement to the AGC and they had negotiated a successor agreement). Accord *Oklahoma Fixture Co*., 333 NLRB 804 (2001), enf. denied 74 Fed. Appx. 31 (10th Cir. 2003).[8]

The Company offers no valid basis to distinguish or disregard this Board precedent. The Company's sole argument is that Local 72 treated it unfairly by refusing to refer workers when it failed to make benefit fund contributions and dues payments under the agreement and by refusing to accept its untimely notice of termination. See Tr. 15–19, 69–72. However, the Company does not dispute that Local 72's refusal to refer workers constituted permissible "economic action" to collect such monies owed under article 15 and schedule B of the agreement. Nor does the Company cite any other contractual provision or legal authority supporting its argument. Rather, the Company simply asserts that Local 72 ought to have shown it "some mercy" during a difficult financial period (Tr. 15).[9]

B. Whether the Requested Information was Relevant and Necessary

It is well established that a union is entitled to information that is relevant and necessary to policing or enforcing compliance with an extant collective-bargaining agreement, including an

[8] As indicated in the Tenth Circuit's opinion denying enforcement in *Oklahoma Fixture*, a number of circuit courts have rejected or questioned the reasoning in *Fortney & Weygandt* and other similar Board decisions. However, administrative law judges are required to follow current Board precedent unless and until it is reversed by the Supreme Court. *Western Cab Co*., 365 NLRB No. 78, slip op. at 1 n. 4 (2017).

James Geren, Local 72's business manager and secretary-treasurer, testified that he believed the Company was actually bound by the successor agreement negotiated with AGC (Tr. 45). However, that position is inconsistent with the complaint (par. 5(c)), the General Counsel's position at the hearing (Tr. 11–12, 42, 60–61), and the Board precedent cited above. Further, there is no need to address the issue as the Company's obligation to provide information to Local 72 would have been the same regardless of which agreement it was bound to.

[9] Accordingly, it is unnecessary to address whether the Company would have been justified in terminating the agreement if Local 72's refusal to refer workers in mid-2015 did not constitute permissible "economic action."

8(f) prehire agreement. *W.B. Skinner, Inc.*, 283 NLRB 989, 990 (1987).[10] Certain information, such as the wages, hours, and working conditions of unit employees, is considered presumptively relevant and must be furnished to the union on request unless the employer provides a legitimate basis for not doing so. Id.; and *Matthews Readymix, Inc*., 324 NLRB 1005, 1009 (1997), enf. denied on other grounds 165 F.3d 74 (D.C. Cir. 1999). If requested information does not directly relate to unit employees' wages, hours, and working conditions, and its relevance would not otherwise be apparent or obvious to the employer under the circumstances, the union must explain the relevance of the information. *Disneyland Park*, 350 NLRB 1256, 1258 (2007); and *Brazos Electric Cooperative*, 241 NLRB 1016, 1018–1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980).

Here, as indicated by the General Counsel, the third item in Local 72's information request—a list of all employees who performed work covered by the AGC agreement and the payroll information for all such work since January 1, 2016—directly related to the unit employees' wages and benefits and was therefore presumptively relevant. See, e.g., *Gimrock Construction, Inc*., 344 NLRB 934, 938 (2005), enfd. 213 Fed. Appx. 781 (11th Cir. 2006); *Diversified Bank Installations, Inc*., 324 NLRB 457, 467 (1997); and *Excel Fire Protection Co*., 308 NLRB 241, 247 (1992). Further, the Company has offered no evidence or basis to rebut the presumption.

As for the first item (projects awarded), second item (projects bid on but not yet awarded), and fourth item (projects where covered work was subcontracted), contrary to the General Counsel's contention this information was not presumptively relevant. See *Diversified Bank Installations,* 324 NLRB at 468 (project information); *A-1 Door and Building Solutions*, 356 NLRB 499, 502 (2011) (bidding information); and *Disneyland Park,* 350 NLRB at 1258 (subcontracting information). Further, although Local 72 had a reasonable basis for requesting this information,[11] the Union never explained to Simonson why it was doing so, either in the letter or otherwise, at the time of the request.

[10] A union may be entitled to such information even if the agreement has expired, in order to verify compliance during the agreement's term. See *Audio Engineering, Inc*., 302 NLRB 942, 943–944 (1991). Thus, here, Local 72 would arguably be entitled to the requested information going back to January 1, 2016 even if the Company no longer was bound to any agreement with Local 72 in January 2017, when Local 72 requested the information. However, the General Counsel does not make this argument. Further, as discussed above, under Board precedent the Company remained bound by the AGC agreement for another year, through May 31, 2017, pursuant to its automatic renewal provision. Accordingly, it is unnecessary to address whether the Company was obligated to provide Local 72 with requested information between January 1 and June 1, 2016 even if the Company was no longer bound by the agreement when Local 72 requested the information.

[11] Cf. *Knappton Maritime Corp.,* 292 NLRB 236, 239 (1988) (employer's prior contract violation provided a reasonable basis for the union to scrutinize other similar actions by the employer). See also *Public Service Co. of New Mexico v. NLRB*, 843 F.3d 999, 1006–1007 (D.C. Cir. 2016), enfg. 360 NLRB 573 (2014).

However, the record as a whole leaves little doubt that Simonson knew why Local 72 was requesting the information. Indeed, Simonson essentially admitted in his opening and closing statements at the hearing that he understood why the Union had requested the information, stating that his business had been in debt for some time; that it had been repeatedly audited and found to owe tens of thousands of dollars to the union trust funds; that he had "been dealing with this type of scenario that we have here for years and years"; and that he did not respond to Local 72's January 2017 information request simply because "every time I was open, I got nowhere. . . [it] was never—it was just more of this." (Tr. 15–19, 70–71). Thus, as the relevance of the information was apparent or obvious, there was no need for Local 72 to explain the relevance. See *Brazos Electric Cooperative*, 241 NLRB at 1018–1019.

Simonson also asserted during his closing statement that he did not keep a list of his bids. However, he never told the Union that. An employer cannot "simply remain silent" in the face of a union's request for relevant and necessary information. *U.S. Postal Service*, 332 NLRB 635, 639 (2000). See also *Superior Protection, Inc*., 341 NLRB 267, 269 (2004) ("It is well established that an employer may not simply ignore an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent it encompasses necessary and relevant information."), enfd. 401 F.3d 282 (5th Cir. 2005), cert. denied 546 U.S. 874 (2005). Further, there is no contention or evidence that compiling a list of bids would be unduly burdensome. Thus, the nonexistence of such a list is no defense. See *Harco Laboratories,* 271 NLRB 1397, 1399 (1984); and *Plough, Inc.*, 262 NLRB 1095, 1096 n.9, 1104 (1982).

Accordingly, the Company's refusal to provide the requested information violated Section 8(a)(5) and (1) of the Act, as alleged.

ORDER[12]

The Respondent, Lundeen Simonson, Inc., Spokane, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish Operative Plasterers & Cement Masons International Association, Local No. 72 with requested information that is relevant and necessary to the Union's performance of its functions as the limited exclusive collective-bargaining representative of the Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information it requested on January 11, 2017.

(b) Within 14 days after service by the Region, post at its facility in Spokane, Washington copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since January 11, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 17, 2017

Jeffrey D. Wedekind
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to furnish Operative Plasterers & Cement Masons International Association, Local No. 72 with requested information that is relevant and necessary to the Union's performance of its functions as the limited exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information it requested on January 11, 2017.

LUNDEEN SIMONSON, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-195000 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.